No. 83981-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

LISA MULLEN and KEVIN DEAN,

Petitioners.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SKAGIT COUNTY

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# SUPPLEMENTAL BRIEF OF PETITIONER KEVIN DEAN

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## A. INTRODUCTION

To investigate allegations of theft of more than one million dollars from a car dealership, the State chose to retain the services of the dealership's corporate accountant to act as the State's chief investigator. In the course of his investigation of the alleged crimes of Lisa Mullen and Kevin Dean, the accountant found evidence of crimes committed by the alleged victim, the investigator's former client. The investigator did not share that information with the defendants.

The evidence the State withheld corroborated the defense theory of the case, undercut the State's case, and impeached the two central witnesses of the State's case. The State's withholding of such material evidence violate the rule announced in Brady v. Maryland.[1] Mr. Dean is entitled to a new trial, one that is based upon all the material evidence and not merely that which the State chooses to reveal.

## B. ISSUE PRESENTED

The Fourteenth Amendment of the United States Constitution requires the government disclose to the defense evidence which is material either as substantive or impeachment evidence. This obligation extends to those who are assisting the prosecution. The State's lead investigator did not disclose evidence of thefts by the alleged victim from the same

[1] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

corporation occurring at the same time as the allegations against Mr. Dean. Did the State fail to disclose material evidence?

C. STATEMENT OF THE CASE

Ron Rennebohm purchased Frontier Ford in Anacortes in 1990. 1/18/06 RP 130. At the time of Mr. Rennebohm's purchase, Lisa Mullen was employed in the bookkeeping department of the dealership and soon Mr. Rennebohm made her the comptroller. 1/18/06 RP 132. Mr. Dean was hired as the dealership's general manager in 1996. Richard Rekdal, and his firm Clothier and Head, were retained as both Frontier Ford's accountant as well as Mr. Rennebohm's personal accountant beginning in the early 1990's.

Every employee at Frontier Ford had an account receivable which allowed them to take preauthorized draws on their salaries or, in some instances, loans from the dealership. 1/9/06 RP 91; 1/18/06 RP 172. The account balances were then deducted from subsequent salary. 1/21/06 RP 91. In June 2002, Mr. Rennebohm contacted Anacortes Police alleging Ms. Mullen had stolen hundreds of thousands of dollars from Frontier Ford. 1/5/06 RP 71. Despite the amounts allegedly involved, Mr. Rennebohm urged police to wrap up their investigation in a matter of days and simply arrest Ms. Mullen. 1/5/07 RP 79.

In their most basic form, the alleged thefts concerned Ms. Mullen using draws from her own account receivable, as well as those of other current and former employees, to purchase nonbusiness items for personal use. Through the machinations of the bookkeeping process, Ms. Mullen was then able to "pay off" the debts reflected in the accounts receivable by transferring funds from other accounts within Frontier Ford's ledger, but without ever actually paying money back to Frontier Ford. Given the fact that Frontier Ford's annual sales totaled nearly $80 million dollars, Ms. Mullen's mispostings within the ledger went unnoticed for years, even as the accumulated misstatements surpassed $1,200,000. 1/25/06 RP 82, 181.

Because the Anacortes Police Department did not have the ability to investigate such complex allegations of fraud, the Skagit County Prosecutor elected to retain Mr. Rekdal to investigate the allegations. 1/5/07 RP 87; 1/30/06 RP 94-95. Despite working on behalf of the prosecutor's office, Mr. Rekdal and his firm continued to act as Frontier Ford and Mr. Rennebohm's personal accountant. 1/26/06 27-30; 1/27/06 RP 46. During the course of the investigation, Mr. Rekdal learned that over the course of years Mr. Rennebohm had underreported a substantial amount of corporate and personal income, between $250,000 and $1,000,000, had used corporate funds to pay off personal loans, and had

failed to pay state or federal taxes on any of those funds. CP 1262-75. Despite the fact that he was at that time retained by the Skagit County Prosecutor's office, Mr. Rekdal did not reveal the information to the parties in the present matter. CP 1266. The full extent of Mr. Rekdal's nondisclosure is discussed in greater detail in the arguments that follow.

The vast majority of questionable transactions in Frontier Ford's books were posted by Ms. Mullen personally, and the remainder were done by the bookkeeping staff whom she supervised. 1/27/06 RP 77. Mr. Dean did not write a single check or make a single inappropriate transfer or posting in Frontier Ford's book. Unlike the hundreds of thousands of dollars of purchases which the State traced to Ms. Mullen by receipts, checks, and even pictures, the State did not offer a single transaction traceable to Mr. Dean. See 1/8/06 RP 180 (testimony regarding Ms. Mullen writing checks to herself and debiting amount to Mr. Dean's account receivable); 1/9/06 RP 15-23 (detailing Ms. Mullen's purchase of more than $33,000 in jewelry in 20-month period); 1/11/06 RP 169-75 (detailing Ms. Mullen's purchases of Doncaster clothing totaling nearly $32,000 in a seven-month period); 1/11/06 RP 181-84 (detailing Ms. Mullen's purchases of stuffed toy rabbits from Bunnies by the Bay totaling $19,622); 1/13/06 RP 140-50 (detailing Ms. Mullen's purchases at

St. John Boutique totaling nearly $75,000 over four months), 1/17/06 RP 34 (detailing single purchase of jewelry by Ms. Mullen totaling $17,500).

Ms. Mullen testified the mispostings which were at the heart of the state's case, as well as the purchases were done with Mr. Rennebohm's knowledge and approval. 1/31/06 RP 120; 2/1/06 RP 42. Ms. Mullen testified the postings were designed to "hide the profits" of Frontier Ford from Mr. Rennebohm's business partner, Ragnar Pettersson. 1/31/06 RP 160. By reducing the reported profits, the postings decreased the salaries of managers (such as Mr. Dean) whose pay was determined in part as a percentage of profit. 1/31/06 RP 161-62. In return for her assistance, Mr. Rennebohm provided her numerous and expensive gifts purchased by Frontier Ford. 1/31/06 RP 163.

A large portion of Mr. Dean's salary was determined based upon the dealership's monthly sales and his salary fluctuated significantly from month to month depending on monthly sales. Because Mr. Dean was then going through a divorce and needed a predictable monthly pay from which to calculate child support, Ms. Mullen testified that at the direction of Mr. Rekdal and with Mr. Rennebohm's knowledge, she created an accrued salary account for Mr. Dean in which, after paying Mr. Dean a predetermined amount each month in salary, she deposited his surplus monthly income. 1/29/06 RP 65-68; 1/31/06 RP 127-28. Ms. Mullen

testified she ceased using the account for that purpose in 1999 at the direction of Mr. Rekdal because of potential tax liabilities arising from the accrued salary structure. 2/1/06 RP 43-45. Ms. Mullen testified that without Mr. Dean's knowledge, she continued to use that account, which still bore Mr. Dean's name, to launder money from her and Mr. Rennebohm's other activities. 2/1/06 RP 44-45. Mr. Rekdal confirmed that numerous postings in this second account were for checks written to and endorsed by Ms. Rennebohm and for items purchased by Ms. Mullen. 1/27/06 RP 82.

Numerous witnesses testified that Mr. Dean and Ms. Mullen had a romantic relationship at some point in time while both were employed at Frontier Ford. 1/6/06 RP 151; 1/13/06 RP 47.

Mr. Dean was charged with one count each of first degree theft, conspiracy to commit first degree theft, and criminal profiteering. CP 542-52. At the close of the State's case, the trial court dismissed the profiteering count against Mr. Dean, but while noting the paucity of evidence on the remaining counts, refused to dismiss them. 1/31/06 RP 54.

Following a trial in January and February 2006, a jury convicted Mr. Dean of both the remaining theft and conspiracy charges. CP 1030-31.

In the weeks following the verdict, Mr. Dean obtained copies of documents filed in a lawsuit brought by Mr. Rennebohm against Clothier and Head, the accounting firm in which Mr. Rekdal was a aprtner. 5/19/06 RP 5. In particular, the documents for the first time revealed Mr. Rekdal was aware, at least two years before the trial in this case, of Mr. Rennebohm's embezzlement and tax evasion. 5/19/06 RP 12. The documents revealed that immediately following his trial testimony, Mr. Rekdal had expressed significant doubts in the truth of Mr. Rennebohm's claim's of ignorance of the alleged thefts. Yet, none of thise was revealed to Mr. Dean.

D. ARGUMENT

THE STATE DEPRIVED MR. DEAN OF DUE PROCESS BY FAILING TO DISCLOSE MATERIAL EVIDENCE.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the right to a fair trial and a meaningful opportunity to present a defense. U.S. Const. amend. XIV; California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Due process requires the government disclose to a defendant material evidence. Brady, 373 U.S. at 87. This requires the government disclose to a defendant all exculpatory or impeachment evidence whether it is requested or not.

Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

> There are three components of a Brady violation:
>
> (1) The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued.

Strickler, 527 U.S. at 281-82.

1. The State withheld evidence. The Brady rule encompasses evidence beyond that actually known by the prosecutor because "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case." Kyles v. Whitley, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Thus, as the State of Louisiana conceded in Kyles, the government "is held to a disclosure standard based on what all State officers at the time knew." Id. at 438, n.11. The Court recognized that an any other rule would "amount to a serious change of course from the Brady line of cases." Id. at 438. Because the prosecutor has the duty and ability to implement rules that ensure the government meets its obligation, Brady applies even to information the prosecutor "does not happen to know

about it." Id. Moreover, a violation exists "irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87

The relevant question is then whether Rick Rekdal "was acting on the government's behalf in this case." Without doubt, the answer is yes.

Because the Anacortes Police Department did not have the ability to investigate complex allegations of fraud, the Skagit County Prosecutor elected to retain Mr. Rekdal to investigate the allegations. 1/5/07 RP 87; 1/30/06 RP 94-95. Despite working on behalf of the prosecutor's office, Mr. Rekdal and his firm continued to act as Frontier Ford and Mr. Rennebohm's personal accountant. 1/26/06 27-30; 1/27/06 RP 46. It was during the course of his investigation that Mr. Rekdal learned that over the course of years Mr. Rennebohm had underreported a substantial amount of corporate and personal income, between $250,000 and $1,000,000, had used corporate funds to pay off personal loans, and had failed to pay state or federal taxes on any of those funds. CP 1262-75. Mr. Rekdal stated he discovered Mr. Rennebohm's own embezzlement while assisting in the State's investigation. CP 5701, ¶26. Mr. Rekdal stated he learned of the fraud while "up there investigating" the allegations against Mr. Dean and Ms. Mullen. CP 6514 (Deposition p155). The State paid Mr. Rekdal more than $230,000 for his investigation of this case. CP 1060. By any measure, Mr. Rekdal was acting on the State's behalf.

Mr. Dean cited Kyles to the trial court, CP 1188, and Kyles plainly applies the Brady obligation "to others acting on the government's behalf." 514 U.S. at 437. Nonetheless, the trial court concluded that Brady was not violated because the prosecutor was not aware of the information and "no authority cited supports [the] proposition" that Mr. Rekdal's nondisclosure implicates Brady. CP 1279. The State's Brady obligation extended to information known by Mr. Rekdal, regardless of whether the prosecutor himself was aware of that information. Kyles, 514 U.S. at 438. A contrary rule:

> boils down to a plea to substitute the police [or other investigating agency] for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.

Kyles, 514 U.S. at 438.

The State withheld evidence.

2. The withheld evidence was material. Non-disclosed evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. This standard does not require a defendant to show the withheld evidence would have led to an acquittal. Kyles, 514 U.S. 434. Kyles took pains to reiterate four points regarding the materiality test.

First, the Court reiterated:

> [t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial."

(Emphasis added.) Id. at 434 (quoting Bagley, 473 U.S. at 678).

Second, sufficiency of the evidence is not the touchstone of materiality: "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Kyles, 514 U.S. at 434-35.

Third, once constitutional error has been established there is no need for harmless error review, since

> a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different . . . necessarily entails the conclusion that the suppression must have had substantial and injurious effect or influence in determining the jury's verdict.

Id. at 435.

Finally, in determining materiality, the "suppressed evidence [is] considered collectively, not item by item." Id. at 437; United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

Analyzing the withheld evidence in under this framework demonstrates its materiality. And while the evidence must be considered in total, Mr. Dean offers an analysis of the constituent parts merely to highlight to the materiality of the sum.

a. The State withheld evidence that Mr. Rennebohm was aware of and complicit in mispostings in the financial records. The State's evidence established each and every questionable posting was done by Ms. Mullen. The State argued Mr. Dean must have known of the transactions because they involved postings to his account. Yet the State readily accepted Mr. Rennebohm's claimed lack of knowledge of precisely the same type of activity in his own account. The decision to treat Mr. Dean and Mr. Rennebohm differently stemmed from one fact alone: Mr. Rennebohm's assertion to his longtime accountant, Mr. Rekdal, that he was unaware of the activity in his account. 8/27/04 RP 84; 1/25/06 RP 156.

Contrary to this explanation at trial, Mr. Rekdal stated in his subsequent deposition the "majority of nonbusiness activity in Mr. Rennebohm's account receivable benefited Mr. Rennebohm." CP 6567 (Deposition p. 256), compare 1/25/06 151-52, 154 (activity not to Mr. Rennebohm's benefit). Mr. Rekdal's testimony in his deposition, withheld at trial, that Mr. Rennebohm benefited from the majority of activity in his

account undercut the State's basic argument by eliminating the claimed distinction between Mr. Dean's supposed knowledge and Mr. Rennebohm's feigned ignorance.

On February 7, 2006, one week after he completed his testimony at trial, Mr. Rekdal acknowledged in his deposition that he had testified at Mr. Dean's trial that money had left Frontier Ford and this was done without the authorization of Mr. Rennebohm. CP 6564 (Deposition p 245). However in that deposition, Mr. Rekdal then stated that despite that recent trial testimony, while he was certain money had left the corporation he could no longer say it was done without Mr. Rennebohm's authorization. CP 6564-65 (Deposition pp. 245-48). When asked if he had shared his doubts with the prosecutor, Mr. Rekdal responded "he hasn't asked." CP 6564 (Deposition p. 246).

Where withheld evidence implicates the credibility of the testimony of a central witness to the State's case, the evidence must be deemed material. United States v. Giglio, 405 U.S. 150, 154-55, 92 S.Ct. 763 31 L.Ed.2d 104 (1972). The Court noted "the Government's case depended entirely on [the witness's] testimony; without it there could have been no indictment and no evidence to carry the case to the jury." Id. Similarly, Mr. Rekdal's opinion **was** the State's evidence that Mr. Dean committed a crime – that the mispositngs in his account demonstrated his

guilt while similar mispostings in Mr. Rennebohm's account did not.

The withheld evidence undercut the State's "proof" of Mr. Dean's knowledge of the mispostings and Mr. Rennebohm's claimed lack of knowledge of those very mispositngs. The evidence was material.

b. The State withheld evidence impeaching Mr. Rennebohm. The withheld information undercut Mr. Rennebohm's effort to portray himself as a hapless victim preyed upon by those he had trusted. Mr. Rennebohm testified he had dropped out of high school and began in the car industry as a lot boy, moving cars on a sales lot. 1/18/06 RP 121-22. Despite the fact that he translated those humble beginnings into ownership of at least three separate dealerships, one of which was generating as much as $9,500,000 in monthly sales, 1/18/06 RP 149, Mr. Rennebohm testified he is in all respects financially illiterate, completely unable to read so basic a document as a corporate financial statement. 1/18/06 RP 162; 1/19/06 RP 155. Darla Rennebohm even claimed, notwithstanding her husband's obvious success, he could not even read a profit and loss statement. 1/17/06 RP 158.

Mr. Rekdal's testimony of the relative complexity of Mr. Rennebohm's scheme would have undercut his self-portrayal and bolstered evidence of his knowledge of Ms. Mullen's transactions. The information would have recast Mr. Rennebohm as a calculating individual

willing to misrepresent himself where there were direct benefits to doing so, such as overstating Mr. Rekdal's role in the day-to-day business of Frontier Ford so as to improve his position in his professional negligence lawsuit against Mr. Rekdal. Compare e.g., 1/18/06 RP 217(Rennebohm testifying he hired Clothier and Head to "be my eyes and ears") and 1/24/06 RP 39 (Rekdal testifying Clothier and Head were limited to preparing tax returns for Frontier Ford and Rennebohm and occasional special projects).

When asked during his deposition if there was a connection between Mr. Rennebohm's failure to report income and the allegations against Mr. Dean and Ms. Mullen, Mr. Rekdal invoked the attorney client privilege. CP 6517 (Deposition p.169). A jury hearing of that invocation could have properly speculated that Mr. Rennebohm's fraud was indeed related to the allegations against the defendant; that it was as described by Ms. Mullen in her trial testimony; and that the activity was authorized.

At trial, the jury heard that Mr. Rennebohm had previously acknowledged that during his divorce from his former wife, he signed a false note giving one of his shares in Bellevue Cadillac to his then partner Ragnar Pettersson, in an effort to reduce Mr. Rennebohm's ownership interest and protect the dealership from his wife in their property settlement. 1/19/06 RP 110-16. In his testimony, however, Mr.

Rennebohm would not admit he signed the false note or even that there was a false note but only that he testified to that version of events in a lawsuit between himself and Mr. Pettersson. 1/19/06 RP 107.

In his deposition the day after he completed his trial testimony, Mr. Rekdal shared that Mr. Rennebohm knew the note he had signed in favor of Ragnar Pettersson was invalid. CP 6523 (Deposition p.193). Mr. Rekdal stated had never shared that knowledge prior to the deposition. Id. Although he was subpoenaed to testify at trial in the case between Mr. Rennebohm and Mr. Peterson, Mr. Rekdal did not do so invoking some unidentified privilege. CP 6525 (Deposition pp.198-99).

The deputy prosecutor at trial moved to preclude questioning of Mr. Rekdal regarding the false note asserting "I don't think [Mr. Rekdal] has any personal knowledge of the note we are talking about." 1/26/06 RP 75. The court agreed there was no relevance to such questioning. Of course, as his deposition made clear, Mr. Rekdal did have knowledge of the fake note and did have knowledge that Mr. Rennebohm knew it was fraudulent, he had simply suppressed that information.

Mr. Rennebohm testified during trial that in 2001 he made a personal loan to Frontier Ford because it was experiencing cash flow problems. 1/18/06 RP 211. Mr. Rennebohm stated he thought it was odd that there was a drain on cash despite the regular profits the dealership was

then generating, plainly implying it was a product of Ms. Mullen and Mr. Dean's alleged improprieties. 1/18/06 RP 212. Though he did not share as much at trial, Mr. Rekdal stated in a declaration in the civil suit that the cash flow problems in 2001 were the result of Mr. Rennebohm taking money out of the corporation. CP 5686-90.

Again, the evidence undercut the two witnesses at the heart of the State's case, and was plainly material. Giglio, 405 U.S. at 154-55.

c. The State withheld evidence contradicting and/or impeaching Mr. Rekdal's testimony. The information withheld by Mr. Rekdal undercut his own testimony that he ended his representation of Frontier Ford solely because Mr. Rennebohm's constant involvement in litigation was a drag on his work for other clients. 1/27/06 RP 57. While this was apparently part of the decision, the principal basis was his discovery of Mr. Rennebohm's potential criminal acts. CP 6575 (Deposition p. 9, 284-86). Armed with the withheld information, the jury may well have concluded Mr. Rekdal was seeking to distance himself from any potential professional or criminal sanctions resulting from his preparation of Mr. Rennebohm's federal tax returns during the period in which Rennebohm was not reporting substantial income.

Finally, the mere fact that Mr. Rekdal chose to withhold from his client the existence of an actual conflict of interest with a former client

who happened to be the alleged victim is a material fact which the jury should been permitted to consider in conjunction with the State's offer of Mr. Rekdal's credentials as a certified public accountant. In closing argument the prosecutor posed the question to the jury "What evidence do you have to show that Clothier and Head or Rick Rekdal are involved in an accounting scandal?" 2/6/06 RP 113. In fact, such evidence existed but had been withheld from the defense and the jury.

At the end of the day, had Mr. Rekdal disclosed even the fact that he was withholding information from the prosecutor, it is hard to imagine any prosecutor relying on him not only to investigate the case but as the keystone of the State's case. Again, as in Giglio, this evidence is plainly material.

d. Whether the prosecutor or investigator appreciated the materiality of the withheld evidence is irrelevant. The Court of Appeals excused the State's failure to disclose saying "[t]hey had no reason to perceive the exculpatory value of documents . . . until Mullen testified at trial." Opinion at 14. The opinion also states "the prosecutor did not recognize that the entries were significant to the defense." Opinion at 15-16. Those two sentences undercut any conclusion that the evidence was not material. First, the court's necessarily recognized the information was material, it simply excused the nondisclosure. Second, even if the State

was unaware of the evidence's materiality prior to trial, the obligation under Brady does not merely exist pretrial. Third, a Brady violation arises regardless of whether of evidence is withheld intentionally or inadvertently. Agurs, 427 U.S. at 110. Fourth, whether the prosecutor had personal knowledge of the information or its materiality is irrelevant. Kyles, 514 U.S. at 437. The fact that Mr. Rekdal or even the prosecutor did not appreciate the materiality of the evidence does not matter as it is the court that is the final arbiter of materiality. Kyles, 514 U.S. at 438.,

Mr. Rekdal withheld the information precisely because he understood its materiality. He withheld it because it implicated a former client, who happened to be the alleged victim in the present case. He disclosed it in the professionally liability suit because it rebutted Mr. Rennebohm's claims in precisely the same fashion that Mr. Dean attempted in his trial; i.e. what made it relevant as a defense in the civil suit is precisely what made it material in Mr. Dean's trial. When asked during his deposition if there was a connection between Mr. Rennebohm's failure to report income and the allegations against Mr. Dean and Ms. Mullen, Mr. Rekdal invoked the attorney client privilege. CP 6517 (Deposition p. 169). Mr. Rekdal fully appreciated the import of the evidence he withheld.

Moreover, the prosecutor had every reason to believe there was a problem. As of December 2004, more than one year prior to trial, the prosecutor began communicating with Mr. Rekdal only through Mr. Rekdal's attorney. CP 1234. There is no indication this fact itself was made available to the defense. If the prosecutor did not appreciate the materiality of the evidence, it was because he chose not to. Intentional prosecutorial ignorance cannot defeat a Brady claim.

The fact that the State chose to employ an investigator who at the time of his hiring had, at a minimum, a potential conflict of interest, and who had some point had an actual conflict of interest, does not insulate the State and its investigator from the dictates of Brady. It would be a curious exception to Brady to excuse the nondisclosure of evidence of the government's malfeasance simply because such malfeasance is predictable. Mr. Dean had no ability to demand the State use one investigator over another. The prosecutor alone controlled the decision of who investigated the case. See 1/30/06 RP 94-95 (Detective Nordmark testifying that contrary to his wishes case was not referred to Attorney General's Office for investigation). If one party must bear the brunt of the constitutional violation, it must be the party who had the ability to avoid it; the State.

The withheld evidence was material.

3. The State's obligation under *Brady* is not excused by speculation that a defendant might have learned of the information on his own. The Court of Appeal's concluded no Brady violation occurred here as the opinion speculates Mr. Dean could have discovered the suppressed evidence on his own. Opinion at 11 (citing inter alia State v. Thomas, 150 Wn,.2d 821, 851, 83 P.3d 970 (2004)). But such a standard is inconsistent with the Supreme Court's recognition that a Brady violation occurs even if the defense has never requested its disclosure. Agurs, 427 U.S. at 106; Bagley, 473 U.S. at 682; Kyles, 514 U.S.at 434-35. If a defendant need not have even requested the material to trigger the State's obligation under Brady, it is simply nonsensical to say he must do so with some degree diligence.

Thomas's discussion of a due-diligence standard is dicta as this Court determined the evidence was not material. 150 Wn.2d at 851-52. To the extent this dicta can be read as imposing a due diligence standard, it seems to arise out of a fundamental miscasting of Brady's requirements. Thomas begins its Brady analysis with the statement that the evidence "must have been requested by Thomas and material to his guilt or punishment for Brady to apply at all." 150 Wn.2d at 851. That is a plainly erroneous statement of law. "[T]he duty to disclose such evidence is applicable even though the there has been no request by the accused."

Strickler, 527 U.S. at 280. Brady does not depend upon a request by the defendant for disclosure.

Thomas in turn cites to In re the Personal Restrain of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). Yet Benn was overturned on habeas review. See Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002), cert. denied, 537 U.S. 942 (2002) (holding this Court's holding was a clearly erroneous and an unreasonable application of Brady).

The facts of Strickler illustrate the Court has never adopted a due-diligence standard nor considered such a standard consistent with is Brady jurisprudence. The contested evidence in that case concerned records of additional police interviews with a key prosecution witness. Strickler, 527 U.S. at 273. The Court observed that based upon the witnesses' trial testimony as well as letters the witness had sent to a local newspaper, Strickler's trial attorneys "must have known" the witness had given multiple interviews with detectives. Id. at 285. Plainly if a due-diligence standard existed, the finding that defense lawyers "must have know" of the factual predicate of a Brady claim would have ended of the Court's discussion, as the failure to follow up on that knowledge would plainly fall short of due diligence, but it did not. Instead, the court analyzed the claim fully, rejecting only because it concluded the evidence was not material.

A due-diligence standard turns Brady's straightforward application into one of gamesmanship. A prosecutor would be free to purposefully withhold plainly material evidence, even in the face of a clear request by the defendant, based upon her view that a defendant will discover it on his own. And even if it became clear at trial that that the defendant had failed to discover the information, the prosecutor could continue withholding the evidence based upon her view that the defendant had not been diligent enough in his efforts. The prosecution becomes the final arbiter of when even plainly material evidence will be disclosed. Yet the point of Brady and its progeny is "to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." Kyles, 514 U.S. at 440 (citations omitted).

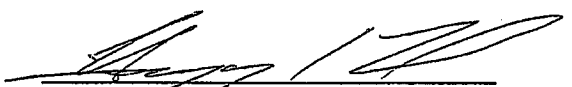
Even if such a standard exists, Mr. Dean could not have discovered the withheld information in this case. A contrary conclusion fails to appreciate what exactly Mr. Rekdal withheld and why he did so. Mr. Rekdal did not disclose the information because of his professional obligation to his former client prevented it. CP 1266. That obligation existed regardless of whether the prosecutor or defense counsel asked Mr. Rekdal to divulge what he knew. In light of his willingness to withhold the information from a client – the prosecutor - who was paying him

nearly a quarter of a million dollars precisely to investigate the books of Frontier Ford, there can be no reason to expect Mr. Rekdal would have ever disclosed that information to the defendants no matter how hard they tried to find it. But for a mistake by an employee at the King County Superior Court Clerk's Office the evidence would have never come to light. And, the only reason Mr. Rekdal discussed this information during the course of his deposition, was because deposition was a part of a professional liability suit by Mr. Rennebohm and thus the privilege was waived. However, the deposition, as with much of the case, was sealed because of the disclosure of privileged information. Even if such a due-diligence standard could coexist with Brady and Kyles, there is no reasonable basis to conclude Mr. Dean could have discovered the withheld material information here.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Dean's conviction.

Respectfully submitted this 20th day of August, 2010.



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## IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON<br>Respondent<br>v<br><br>LISA MULLEN AND KEVIN DEAN,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | SUPREME COURT NO. 83981-6 |

**DECLARATION OF SERVICE**

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 20th DAY OF AUGUST, 2010, A COPY OF **SUPPLEMENTAL BRIEF OF PETITIONER, KEVIN DEAN** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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Skagit Co Prosc Atty Ofc
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Lake Stevens, WA 98258

**SIGNED** IN SEATTLE, WASHINGTON, THIS 20TH DAY OF AUGUST, 2010

x Ann Joyce